

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 April 2006

CASE NO.: 2004-LHC-1933

OWCP NO.: 07-103132

IN THE MATTER OF:

LARRY BRANTLEY

Claimant

v.

SHELL OFFSHORE COMPANY

Employer

APPEARANCES:

V. WILLIAM FARRINGTON, ESQ.

For The Claimant

CHARLES G. CLAYTON, IV, ESQ.

For The Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Larry Brantley (Claimant) against Shell Offshore Oil Company (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on December 20, 2005, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence

and submit post-hearing briefs. Claimant offered 22 exhibits, Employer proffered 23 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.¹

Post-hearing briefs were received from the Claimant and the Employer. Claimant and Employer filed reply briefs. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That Claimant was injured on February 18, 1986.
2. That Claimant's injury occurred during the course and scope of his employment with Employer.
3. That there existed an employee-employer relationship at the time of the accident/injury.
4. That Employer was notified of the accident/injury on February 18, 1986.
5. That Employer filed a Notice of Controversion on March 2, 2004.
6. That an informal conference before the District Director was held on February 19, 2004.
7. That Claimant received temporary total disability benefits from February 18, 1986 through September 10, 1986 at a compensation rate of \$388.15 for 28 and 3/7 weeks.
8. That Claimant's average weekly wage at the time of injury was \$582.20.
9. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

¹ References to the transcript and exhibits are as follows: Transcript: Tr.____; Claimant's Exhibits: CX-____; Employer's Exhibits: EX-____; and Joint Exhibit: JX-____.

II. ISSUES

The unresolved issues presented by the parties are:

1. Whether Employer is liable for chiropractic treatment and additional medical expenses.
2. Whether the Employer may seek reimbursement from Claimant or Dr. Karno, if Employer is not liable for chiropractic treatment.
3. Section 31(a) fraud.
4. Attorney's fees.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified at formal hearing and was deposed by the parties on December 15, 2004.² He has a Bachelor's Degree in Business Management from Southern University in Baton Rouge, Louisiana. (Tr. 110; EX-1, p. 4). He sustained a work-related injury on February 18, 1986, while attempting to swing off a boat onto a platform. The rope broke and he hit his back on the platform. (Tr. 110-112). He treated with Dr. Charles Kreiger, who diagnosed a lumbar syndrome and prescribed medication. (Tr. 112-113). Claimant remained off work for seven to nine months and did not undergo back surgery. (Tr. 113). Upon his return to work with Employer, he worked in a clerical setting until October 1996. (Tr. 113-114).

In 1987, Claimant first saw Dr. Karno who diagnosed a subluxation. (EX-1, p. 47). Dr. Karno would adjust Claimant's neck and entire spine, but he did not do adjustments on Claimant's shoulders, legs, or fingers. (EX-1, pp. 63-64). Claimant felt he benefited from the chiropractic treatments after several weeks. (Tr. 115). There were gaps in Claimant's treatment with Dr. Karno because Dr. Karno's office hours were

² Claimant was also deposed on November 7, 2005, in connection with a state workers' compensation claim. (EX-21). The deposition was accepted into evidence for impeachment purposes and will be considered for such purposes.

not always convenient. (Tr. 117). He treated with Dr. Karno approximately one month prior to formal hearing and underwent a spinal manipulation. (Tr. 121).

After Claimant stopped working for Employer in 1996, he owned a construction company, but did not perform hard construction work. Claimant also became involved in an internet gaming endeavor. (Tr. 117-119, 179). Subsequently, he again became involved in construction work and performed manual labor and fairly heavy work that aggravated his back. (EX-1, pp. 22, 45). Subsequently, he worked at Wal-Mart for approximately one and one half-years as "a lift driver." At the time of formal hearing, he was employed by Wal-Mart as a systems operator. (Tr. 119).

In 2004, Claimant injured his left knee while working for Wal-Mart. He twisted his knee as he stepped off a lift and tore "the ACL, the front meniscus, and the back meniscus." He did not injure his back. (Tr. 120). He reported the accident to his supervisor, loss prevention, and the operations manager, but waited a few weeks before he sought treatment for the knee injury. (Tr. 173).

Dr. Butler treated Claimant's knee injury and performed left knee surgery on Claimant in May or June 2004. (Tr. 120-121). His knee continued to hurt. At the time of formal hearing, his doctors were considering whether he needed a half-knee replacement or a whole knee replacement. (Tr. 121).

Claimant did not have significant injuries of any kind between 1986 and 2004. (Tr. 173). Prior to February 1986, Claimant was involved in a motor vehicle accident in 1984 that resulted in the removal of his spleen, broken ribs, a broken wrist, and a shoulder problem. He could not recall problems with or injuries to his back or knee prior to the 1984 motor vehicle accident. (Tr. 174-175). He sustained "bumps and bruises" while playing college football from 1972 to 1974, but did not receive any treatment to his knee. (Tr. 175, 178).

Claimant has not had any accidents, injuries, or illnesses since his knee surgery in June 2004. (Tr. 177). Other than Dr. Karno, Claimant has not seen any doctors about his back since Dr. Krieger released him to full duty work in July 1987. Dr. Butler is the only doctor to treat Claimant's knee, aside from the sciatic nerve treatment he received from Dr. Karno. (Tr. 178).

Claimant agreed his back has good days and bad days. (Tr. 179). His back is likely to hurt when he performs physical activities, rather than when he works at a computer. (Tr. 180). At his deposition, Claimant testified that sometimes he could barely walk out of Wal-Mart when he worked on the lift and would have to seek treatment with Dr. Karno. (Tr. 180-181). He could cough or step wrong while at home and would not be able to move. (Tr. 181-182).

In a Louisiana Workers' Compensation case, Claimant personally prepared Interrogatory Responses Nos. 1 through 20. (Tr. 184-185). His response to Interrogatory No. 6 indicated that he had been incarcerated for money laundering from February 18, 1998 through September 1999. In response to an interrogatory submitted in the instant case regarding incarceration, Claimant referred to his deposition transcript dated December 16, 2004. The deposition transcript does not contain a discussion of Claimant's incarceration. (Tr. 186; EX-1).

At formal hearing, Claimant agreed that his period of incarceration ended in August or September 1999 and testified that he did not see Dr. Karno while incarcerated. (Tr. 186, 189-190). However, he also indicated that he served seventeen months and might have been released before September 1999. (Tr. 190).

In his November 2005 deposition, Claimant stated that he had no prior injuries or problems with his left leg and had not sought treatment for left knee complaints. (Tr. 192). However, he did indicate that he had been diagnosed with a sciatic nerve problem down the back of his left knee and leg, due to the 1986 injury.³ (Tr. 193). At formal hearing, Claimant indicated that Dr. Kreiger did not inform him of the finding of osteoarthritis in his left knee. (Tr. 176). Claimant repeatedly reported left

³ Claimant testified as follows:

Q: Had you had any prior injuries or problems with your left knee?

A: No.

Q: Had you ever seen a doctor for complaints for your left knee?

A: No.

Q: Okay. So you never had any problems with your left knee before this event"

A: No. The only thing about my left knee - and that was the -- my doctor said it was the sciatic nerve. I injured my back way back - February 18, 1986. And it was a lumbar - the sciatic nerve down the back of my left leg and sometimes my right leg. That's the only thing. But not my knee itself, you know.

(EX-21, p. 10).

knee pain to Dr. Karno, which he believed was caused by his sciatica. (Tr. 177).

On February 25, 2005, Dr. Fredrick Keppel examined Claimant and determined he needed a knee replacement. Claimant did not recall Dr. Keppel relating his knee condition to "non-descript football injuries." (Tr. 193-194).

Claimant recalled that Dr. Butler took his medical history and examined his back. Claimant treated with Dr. Butler strictly for his knee and he treated with Dr. Karno for his back. (Tr. 195-196). Claimant did not report knee pain to Dr. Karno after the February 12, 2004 accident and he did not report back pain to Dr. Butler on March 12, 2004, because his former counsel advised him to keep his knee and back treatments separate. (Tr. 199-200, 203).

The Medical Evidence

Dr. J. Lee Moss⁴

On February 27, 1986, Dr. Moss examined Claimant at Employer's request. Claimant presented with complaints of lower back pain radiating down the lateral side of his left hip. Physical examination revealed pain with motion and tenderness "over the lumbosacral region across the paraspinous muscle area on both sides." Dr. Moss diagnosed a lumbosacral strain. (CX-7, p. 1; EX-5, p. 1).

Dr. Charles W. Krieger

On February 28, 1986, Dr. Krieger diagnosed Claimant with a lumbar strain after Claimant sustained a work-related injury. Dr. Krieger opined the injury would not result in a permanent defect and noted Claimant's x-rays were "negative for fractures." He indicated Claimant was not able to work regular duties. (EX-8, p. 18).

From March 1986 through May 1986, Claimant treated with Dr. Krieger on a bi-monthly basis. He consistently reported pain in his lumbar area. He also reported pain into his thoracolumbar and intrascapular regions, as well as pain in his mid-back and upper thoracic area. On March 3, 1986, Dr. Krieger found "some residual muscle spasm with terminal restriction of waist bending," but on March 17, 1986, physical examination revealed

⁴ Dr. Moss's credentials are absent from the record.

unrestricted waist bending and negative straight leg raising. (EX-8, p. 17). In April and May 1986, Claimant continued to present with negative straight leg raising and unrestricted waist bending. (CX-9; EX-8, pp. 15-16). On May 13, 1986, Dr. Krieger noted Claimant underwent "a bone scan, sed rate, RA and SMA-20" which were within normal limits and were not indicative of an arthritic condition or spondylitis. (CX-10; EX-8, pp. 8, 15).

On June 9, 1986, Claimant continued to complain of pain in his lumbar area and reported tingling in his left leg with sitting. He also reported ankle pain and left foot numbness while sitting. Dr. Krieger referred Claimant to Drs. Applebaum and Butler. (CX-11; EX-8, pp. 8, 14). In July 1986, Dr. Krieger diagnosed "lumbar disc syndrome" and recommended a repeat CT scan, which returned normal results.⁵ (EX-8, pp. 3, 8). On July 17, 1986, he continued to complain of back pain with radiation. He also reported pain in his arms and neck when lifting grocery bags. Dr. Krieger found Claimant to be neurologically intact with symmetrical reflexes. (CX-12; EX-8, p. 8).

On August 6, 1986, Dr. Krieger noted that nerve conduction studies of Claimant's lower extremities were "abnormal." He further noted Claimant's condition had not changed. Dr. Krieger referred Claimant to Dr. Burris for a neurological consult. (CX-12; EX-8, p. 8). In a letter dated September 26, 1986, Dr. Krieger indicated that he was not able to explain the degree of disability Claimant experienced. (EX-8, p. 6).

On October 17, 1986, Claimant reported pain radiating into his upper back. On physical examination, Dr. Krieger found tenderness over Claimant's left "posterior superior" spine. Straight leg raising revealed tight hamstrings and Dr. Krieger noted a "good range of waist bending." Claimant presented with similar complaints on November 17, 1986.⁶ (CX-15; EX-8, p. 9).

In March 1987, Claimant complained of discomfort in his mid-back with lifting or bending and intermittent discomfort in his lower back and ankles. Dr. Krieger noted Claimant underwent a left knee arthrogram in mid-January which was normal. Physical examination revealed unrestricted waist bending. He

⁵ The date of the CT scan is not provided and the report of the CT scan is not in the record.

⁶ According to the report, Claimant was examined on November 17, 1985. However, the year is arguably a typographical error.

diagnosed osteoarthritis in Claimant's left knee and a dorsal lumbar strain. (CX-16; EX-8, p. 10).

On July 11, 1987, Dr. Krieger released Claimant to full duty work without restrictions or any impairment. As of October 5, 1987, Claimant remained on full duty work, but was not yet discharged from treatment. (EX-8, p. 11).

Dr. Robert L. Applebaum⁷

On June 20, 1986, Dr. Applebaum examined Claimant. Claimant provided a history of a February 1986 work-related injury and indicated that he received treatment from Drs. Kriger and Moss and that a prior bone scan and CAT scan returned normal results. (EX-9, p. 1).

Claimant presented with complaints of low back pain that occasionally radiated into his neck or left calf. Claimant reported pain in his right leg on rare occasions. (EX-9, p. 1). On physical examination, Dr. Applebaum found "minimal limitation of motion" in Claimant's lumbar region. He did not note "paraspinous muscle spasm" and he found a normal lumbosacral curve. Straight leg testing was "weakly positive" on the left and negative on the right. (EX-9, p. 2).

Dr. Applebaum indicated Claimant's examination showed "minimal mechanical findings and no significant neurological deficit." He found no evidence of impairment from a neurological point of view. (EX-9, p. 3).

Dr. Debra L. Burris⁸

On August 21, 1986, Dr. Burris examined Claimant after a referral from Dr. Krieger. Claimant presented with complaints of pain down the backs of his legs to his knees, numbness of his toes, and occasional shooting pains in his feet. Dr. Burris interpreted Claimant's nerve conduction studies dated July 22, 1986. She indicated the studies "suggested a left posterior tibial neuropathy because of a borderline low amplitude response and a slightly prolonged distal latency." (EX-7, p. 1). She opined Claimant was "status post low back injury." Based on Claimant's normal physical exam and normal nerve conduction velocity study, Dr. Burris opined the "borderline values for the

⁷ Dr. Applebaum's credentials are absent from the record.

⁸ Dr. Burris's credentials are absent from the record.

left posterior nerve" were not significant. (CX-13; EX-7, p. 1).

Dr. Felix G. Rabito⁹

On September 9, 1986, Dr. Rabito examined Claimant at Employer's request. Claimant reported a work-related low back injury occurring in February 1986 and Dr. Rabito noted he had been treated for "an acute low back syndrome with symptoms suggestive of lumbar disc symptoms with sciatica, intermittent sciatica to the left leg and thigh." Dr. Rabito did not review any medical records. (EX-6, p. 1).

Physical examination of Claimant's back revealed a normal lordotic curve. Dr. Rabito noted that extension and lateral rotation of Claimant's back was not uncomfortable and he found tightness in both hamstrings. (EX-6, pp. 1-2). He opined Claimant sustained an "acute low back strain with a history suggestive of intermittent sciatica of the left lower extremity." He further opined Claimant showed evidence of a moderate degree of muscle spasm in his back and hamstrings, although he made no positive neurologic findings. (EX-6, p. 2).

Dr. George Karno¹⁰

Dr. Karno, a chiropractor, testified at formal hearing and was accepted as an expert in the field of Chiropractic Care. (Tr. 18). The parties deposed Dr. Karno on December 16, 2004. (EX-2). Dr. Karno first treated Claimant in August 1987, at which time Claimant indicated that Dr. Krieger previously treated his back condition. (Tr. 18, 33).

An August 31, 1987 report identified x-ray findings of "disc thinning" at Claimant's L5-S1 level with "a lateral malposition of L3" and "'spatulated' traverse process at L5;" Dr. Karno testified that he did not write those findings in his records. (Tr. 36). He did, however, write the diagnostic codes on the August 31, 1987 report, which related the following diagnoses: lumbalgia or lumbar pain, lumbar subluxation with muscle spasms, lumbar spinal nerve compression, and lumbar pain

⁹ Dr. Raito's credentials are absent from the record.

¹⁰ Dr. Karno is licensed by the State of Louisiana and belongs to the Chiropractic Association of Louisiana and the International Chiropractic Association. (Tr. 74).

with muscle spasm.¹¹ (Tr. 41; EX-10, p. 66). His primary diagnosis was subluxation of the lumbar spine and he also diagnosed muscle spasm. (Tr. 19; EX-2, p. 8). At his deposition, Dr. Karno opined that subluxation occurred through Claimant's entire lumbar spine. Based on Claimant's history and the initial x-rays, he attributed the lumbar subluxation to Claimant's February 1986 accident. (EX-2, pp. 12-13).

Dr. Karno would not discount reports of Claimant's prior x-rays, scans, and testing because the reports would indicate whether Claimant had a fracture, tumor, arthritis, or infectious process. Thus, he could focus on determining whether or not the patient has a subluxation. (Tr. 35-36). He testified that negative prior x-rays and CAT scans were not "pertinent" to chiropractic treatment because the patient would have been laying down when the x-ray or scan was taken. (Tr. 33). Dr. Karno did not base his diagnoses of subluxation solely on Claimant's x-rays; rather, he diagnosed additional areas of subluxation by use of "palpation" during evaluations at Claimant's visits.¹² (Tr. 47-48).

When a patient presents with a subluxation, the patient receives an adjustment and therapy to rehabilitate the supportive tissues to the spine. The treatments involve heat or ice, mild mechanical tractions, electrical muscle stimulation, or ultrasound. (Tr. 19). Claimant's medical history indicated that he also experienced left leg pain, which Dr. Karno would have treated by treating the subluxation of his lumbar spine. (Tr. 52; EX-10, p. 7). Dr. Karno did not know why Claimant discontinued treatment in 1988. (Tr. 52-53).

Dr. Karno defined subluxation as "a misalignment of the vertebra of the spine that irritate the nerve and interfere with the nerve's ability to function."¹³ He would have adjusted any area of Claimant's spine in which he found a subluxation. (Tr.

¹¹ The diagnostic codes were old computer codes; consequently, Dr. Karno testified that he could not determine exactly what the codes meant. (Tr. 41-42). A report dated September 2, 1987, indicated that the August 31, 1987 examination resulted in diagnoses of lumbalgia, "subluxation, L1, L2, L3, L4, L5", "spinal neural compression L3, L4, L5," and "paravertebral myositis." (CX-17, p. 1).

¹² Dr. Karno defined "palpation" as the "art of identifying what it is you are feeling through your fingers." (Tr. 47).

¹³ Dr. Karno further testified that chiropractic and medical definitions of a subluxation are different. The medical community defines a subluxation as part of a "grosser misalignment of the spine, not a minor misalignment of the spine" that is not associated with interference of the nervous system. (Tr. 34).

42, 45). He further testified that a record of Claimant's treatment, complaints and findings, and case notes showed that Claimant underwent adjustments to subluxations in his cervical region, thoracic and lumbar region, and pelvis. (Tr. 44-45; EX-10, p. 94).

There is no record evidence of treatment during the period from 1988 until May 1993. From May 28, 1993 until 1996, Claimant again treated with Dr. Karno. (Tr. 53-54). During this course of treatment, Dr. Karno x-rayed Claimant's back and listed codes for the following diagnoses: "left posterior superior iliac spine," "right lateral flare," "left list," "left lateral tilt of L5," "left spinous rotation, thoracic 9, 10, 11, 12 - L1, 2, 3, 4," "decreased sacral angle," and "decrease upper lumbar lordosis."¹⁴ (Tr. 58-59; EX-10, pp. 18, 20, 22, 24). Dr. Karno testified the foregoing findings indicated a subluxation. (Tr. 59). Although his records from 1993 to 1996 identify treatment through manual manipulation, Dr. Karno did not note the exact levels that he adjusted and did not indicate whether he had treated any areas of subluxation other than those identified in the x-ray findings.¹⁵ (Tr. 65; EX-10, pp. 18, 20, 22, 24).

Claimant's "Patient Developmental Reports" dated from April 1993 to August 1993 identified occasional complaints of right and left shoulder pain, as well as left leg pain. (Tr. 60; EX-10, pp. 19, 21, 23). At formal hearing, Dr. Karno related Claimant's shoulder complaints to the 1986 accident by explaining that a person can develop different symptoms over a period of time because the body tries to adapt to an acute injury. (Tr. 61). He related Claimant's complaints of knee pain to the lumbar subluxation by explaining that nerves exit the lumbar spine and combine to form the sciatic nerve which controls all function within the leg. (EX-2, p. 21).

A health insurance claim form referencing dates of service from August 16, 1994 to August 19, 1994, contained the following diagnosis: "[e]xacerbation: left leg & lower back pain 8/16/94."

¹⁴ During formal hearing, Employer's counsel referred to findings of an x-ray dated May 28, 1993. However, review of the record does not reveal an x-ray report dated May 28, 1993. Rather, undated records that noted treatment throughout 1993, 1994, and 1996, refer to the foregoing x-ray findings. (EX-10, pp. 18, 20, 22, 24).

¹⁵ Dr. Karno testified that he has no record of whether he treated Claimant's cervical, thoracic, or lumbar spine; he would adjust any problematic area he found on a patient. (Tr. 65). He testified that Claimant's lumbar subluxation caused secondary subluxations at other levels of his spine. (EX-2, p. 23).

(EX-14, p. 85). At formal hearing, Dr. Karno could not recall the incident or diagnosis to which the claim form referred. He defined "exacerbation" as an old injury that has "come up as a symptom so it's brought back to surface." (Tr. 68). Dr. Karno also testified that insurance companies refer to a subluxation as "spinal neural compression." (Tr. 67-68).

There is no record evidence of treatment by Dr. Karno from August 1996 until August 1999. On August 25, 1999, Claimant presented with complaints of low back pain and left leg pain, which he related to the 1986 accident. Claimant reported a pain level of ten out of ten, as well as an inability to bend or lift. Dr. Karno opined that Claimant's condition worsened over time due to a lack of treatment. (Tr. 75; EX-10, pp. 34-37, 48).

Dr. Karno testified that August 25, 1999 x-rays identified subluxation.¹⁶ (Tr. 20-24). He has not taken x-rays of Claimant since August 1999. (Tr. 30).

On August 30, 1999, Dr. Karno performed surface EMG testing and thermography testing on Claimant.¹⁷ (EX-10, p. 40) The Thermography detects an individual's skin temperature. Dr. Karno testified that a difference of one-half of a degree or more between the right and left sides of an individual's spine indicates that the "automatic part of the nervous system" is not regulating skin temperature at that level. He testified that this indicates an area where a subluxation is present. (Tr. 82).

Dr. Karno's chart notes from August 25, 1999 to November 10, 2005, do not specifically identify which areas or levels of subluxation were treated. (Tr. 84). Although only subluxations in the area of Claimant's L1 through L5 levels and at the L5-S1 level were verified by x-rays, Dr. Karno would have identified and treated any subluxations throughout his whole spine.¹⁸ (Tr. 85). He did not recall providing any treatment for Claimant's knee. (Tr. 87).

¹⁶ The x-ray films of Claimant's lumbar spine were submitted as demonstrative evidence and were identified as CX-22. At his deposition, Dr. Karno explained that he identified lumbar subluxation on the x-ray due to "the spinous rotation to the right and by the posterior joint encroachment of the intervertebral foramen throughout that region." (EX-2, p. 12).

¹⁷ Dr. Karno previously performed SEMG testing on Claimant in June and August 1993. (Tr. 61; EX-10, pp. 8-17).

¹⁸ Dr. Karno testified that he would have verified other subluxations through thermography, surface EMGs, palpation, and range of motion. (Tr. 85).

On July 24, 2002, Dr. Karno generated a narrative report regarding Claimant's condition.¹⁹ He indicated Claimant presented with a "guarded gait" and found "moderate to severe swelling and muscle spasms" at Claimant's posterior superior iliac spine and "lumbar 345." (EX-10, p. 58). Dr. Karno opined Claimant's accident caused "an acute subluxation syndrome," noting his vertebrae had shifted from their normal position. His diagnoses included "injury swinging from," "lumbar segmental/somatic dysfunction," "sciatica," and "lumbago."²⁰ Dr. Karno recommended spinal adjustments and physical therapies including ice, moist heat, and intersegmental mechanical traction. (EX-10, pp. 59-60). A letter dated January 8, 2004, contains nearly identical findings, diagnoses, and recommendations. (EX-10, p. 84).

Dr. Karno testified that chiropractic treatment is integral to the treatment of Claimant's subluxation. (Tr. 26). At his deposition, Dr. Karno diagnosed Claimant's condition as consisting of "moderate" back pain, leg pain, and "some muscle spasm." Dr. Karno related Claimant's condition directly to the subluxation of his lumbar spine and opined the February 1986 injury was "the major contribution" to his subluxation. (EX-2, p. 36).

Dr. Karno could not identify any complicating factors with regard to Claimant's treatment or condition. Dr. Karno opined Claimant would have a better quality of life if he continued to seek chiropractic treatment as he felt it was necessary, as opposed to discontinuing treatment. (Tr. 91). Dr. Karno did not feel that he provided "maintenance treatment" as opposed to treatment for a specific subluxation. (Tr. 96).

According to Dr. Karno, Claimant's condition reaches periods of temporary stabilization after an adjustment. As time passes, his condition destabilizes and he requires another adjustment. (Tr. 91). With regard to maximum medical improvement, Dr. Karno stated "I think many times we've provided [Claimant] a level of treatment at that moment but then again, because of the nature of the injury and how severe it was in the beginning it destabilizes over and over again . . . to say that he's going to reach a level and then stay at that level, no, I don't see that." (Tr. 92). Factors such as a change in gait,

¹⁹ Dr. Karno relied on Claimant's 1999 x-rays in generating a narrative report dated July 24, 2002. (EX-2, p. 15).

²⁰ Claimant's chart notes from 1999 to 2002 contained the foregoing diagnoses as well. (EX-10, pp. 42, 52-53, 63, 68-69, 71).

posture, stress, or sneezing could cause vertebrae to move out of place and require an adjustment. (Tr. 78, 92-93; EX-2, p. 40). At his deposition, Dr. Karno stated that Claimant's condition was not "at stabilization" due to several factors, namely "the change in gait due to [the problem in his knee has] destabilized his lower back . . . some of the stress that he's under due to this case is destabilizing him some also." (EX-2, p. 40).

Dr. Karno did not x-ray Claimant after 1999 because he did not find many changes from Claimant's initial x-rays. (Tr. 97). He testified that additional x-rays would not provide additional information that could be used clinically. (Tr. 98).

Dr. Karno agreed Claimant's lumbar spine has degenerated to such a level that continuous treatment is the only way he can maintain a reasonable quality of life. (Tr. 76). Dr. Karno found evidence of degeneration through decreased disc height in Claimant's spine.²¹ (Tr. 76).

Dr. Karno uses "Fee Facts" every three to five years to ensure that his charges remain "usual and customary."²² (Tr. 28). Based on his fees at the time of formal hearing, Dr. Karno estimated that the cost of Claimant's continued future treatment over the course of his life would total approximately \$405,600.00. (Tr. 89-90; EX-10, p. 93).

Ochsner Clinic²³

Claimant sought treatment with Ochsner Clinic intermittently from February 1989 through September 2005. Ochsner Clinic records dated July 1, 1988, February 21, 1989, and March 25, 1996, indicate that Claimant reported a back injury or back pain. (EX-12, pp. 31, 37-38). It is not clear from the records whether the physicians diagnosed the cause of his back pain or whether they provided or recommended a course of treatment.

On May 23, 2003, Claimant presented with complaints of low back pain and left knee pain. Radiology results regarding Claimant's left knee reported findings of "advanced degenerative

²¹ Dr. Karno stated that a decrease in disc height is indicative of a localized arthritis generally due to trauma. (Tr. 32).

²² "Fee Facts" is a company that surveys doctors' charges and insurance company payments. "Fee Facts" then publishes a list of the "usual and customary" charges in various zip codes. (Tr. 28).

²³ The records from Ochsner Clinic are handwritten and difficult to read.

arthrosis" of Claimant's left knee.²⁴ (EX-12, pp. 20-22). He was scheduled for a left total knee replacement in April 2005. (EX-12, p. 55).

Dr. James C. Butler

The parties deposed Dr. Butler, a board-certified orthopedic surgeon, on October 25, 2005. (EX-17). On March 12, 2004, Claimant presented with complaints of severe left knee pain after twisting his knee. Dr. Butler noted Claimant walked with an antalgic gait and found his lumbar spine to be non-tender with a full range of motion. Examination of Claimant's left knee revealed "tibia vara," "tenderness over the medial joint line and pes bursa," and "mild patellofemoral crepitus." Dr. Butler diagnosed a medial meniscus tear of Claimant's left knee and recommended a MRI of the left knee. (EX-11, p. 21; EX-17, pp. 6-7).

At the time of his initial examination, Claimant did not report any prior problems with his left knee, nor did he report a previous diagnosis of osteoarthritis in his left knee. He also did not provide a history of the February 1986 work-related accident and did not report problems with his lower back and hips. (EX-7, pp. 12, 14). Dr. Butler did not note complaints of lower back pain. (EX-17, p. 13).

On March 30, 2004, Dr. Butler reviewed Claimant's left knee MRI dated March 19, 2004. He noted the MRI showed "arthritis in the medial joint space with a complex tear of the medial meniscus." (EX-1, pp. 2-3, 19; EX-17, p. 7). In addition to his previous diagnosis, Dr. Butler diagnosed medial compartment arthritis of Claimant's left knee and chondromalacia of the patella. He recommended an arthroscopic medial meniscectomy, which Claimant underwent on April 17, 2004.²⁵ (EX-11, pp. 19; EX-17, p. 8).

On May 18, 2004, August 18, 2004 and September 14, 2004, Claimant reported medial knee pain, although Dr. Butler noted Claimant's complaints were improved. Dr. Butler diagnosed "medial compartment osteoarthritis" of Claimant's left knee, which he felt was in an advanced state. (EX-11, pp. 11, 13, 17; EX-17, pp. 9, 14). Claimant again presented with complaints of

²⁴ The report does not clearly identify the kind of imaging study Claimant underwent.

²⁵ The medical records regarding Claimant's left knee surgery can be found at EX-16. At his deposition, Dr. Butler specified that he performed an "arthroscopic partial medial and lateral meniscectomy." (EX-17, p. 8).

knee pain on October 26, 2004, and indicated he wanted to proceed with a total left knee replacement. (EX-11, p. 9). An x-ray of Claimant's knee dated December 23, 2004, revealed "severe degenerative disease of Claimant's left knee medial joint compartment." (EX-11, p. 4).

On March 16, 2005, Claimant reported that Dr. Keppel agreed he should undergo a total knee replacement. (EX-11, p. 5; EX-17, p. 10).

At his deposition, Dr. Butler stated that Claimant had a "varus alignment" of his knee and that such condition "theoretically" could cause lower back problems. (EX-17, pp. 15-16). He further indicated, however, that lower back problems are not commonly caused by a "varus alignment" or irregular gait. (EX-17, p. 16). He defined "subluxation" as "a condition where there is a mal-alignment of the vertebra either caused by trauma or caused by a degenerative process." (EX-17, p. 19). A spinal subluxation can only be identified through an x-ray and cannot be detected through touch. (EX-17, pp. 20-21).

Dr. Butler was not familiar with a surface EMG study nor was he familiar with using thermography to detect a spinal subluxation. He indicated that thermography is not accepted as a reliable diagnostic tool by medical doctors who treat spinal disorders. (EX-17, pp. 24-25).

Dr. Paul Van Deventer²⁶

Dr. Van Deventer was deposed by the parties on May 5, 2005, and testified at formal hearing. (EX-3). On December 21, 2004, Dr. Van Deventer examined Claimant at Employer's request. (Tr. 124). He reviewed reports from Drs. Krieger, Butler, Moss, Rabito, Burris, Applebaum, and Karno, along with an EMG test, a nerve conduction test, CAT scan reports, and a series of x-rays.²⁷ (Tr. 125-126; EX-4, p. 1). In a report dated December 23, 2004, Dr. Van Deventer noted that a review of symptoms revealed "a significant history of osteoarthritis of the left knee . . ." (EX-4, p. 3).

Claimant reported episodes of "midlumbar back pain with some radiation into the left buttock and knee." Dr. Van

²⁶ At formal hearing, the parties stipulated to Dr. Van Deventer's expertise as an orthopedic surgeon. (Tr. 123). He is a board-certified orthopedic surgeon. (Tr. 124).

²⁷ The actual reports are not contained in the record. The dates of the reports are not provided in Dr. Van Deventer's reports or testimony.

Deventer noted a "valgus-type thrust to the left knee with ambulation." (EX-4, pp. 2-3). Claimant presented with complaints of pain in band-like areas across his lower back. He exhibited restricted motion with forward and backward bending. (Tr. 147; EX-4, p. 4). Dr. Van Deventer did not find a "mechanical" reason for the limited range of motion, but noted "fairly significant tightness" of Claimant's back muscles and hamstrings. He found no evidence of neurological involvement to indicate compression of a nerve root. (Tr. 147-148). His findings on physical examination of Claimant were consistent with Dr. Krieger's findings in 1986 and 1987. (Tr. 148).

Claimant provided a history of his February 1986 injury, as well as a history of injuring his knee while working at Wal-Mart in February 2004. (Tr. 151). Based on his review of Claimant's medical records and medical history, Dr. Van Deventer opined Claimant's 1986 accident resulted in a sprain/strain injury. He would have expected Claimant to reach maximum medical improvement nine to twelve months after the accident. (Tr. 152).

With respect to Claimant's knee injury, Dr. Van Deventer testified that Claimant had significant knee arthritis with an obvious change in his gait pattern. He indicated the effect of the gait change on Claimant's back combined with the tightness of Claimant's hamstrings is a "very common source of continued muscular type low back pain." (Tr. 153).

Dr. Van Deventer opined that the CAT scan of Claimant's lumbar spine was normal with respect to "the bony structure." (Tr. 127, 129). Dr. Van Deventer noted narrowing of the disc space between the vertebrae at the lower end of his lumbar spine on the August 25, 1999 x-ray, which he opined indicated early degeneration. (Tr. 129-130).

Dr. Van Deventer reviewed diagnostic studies of Claimant's spine and found no evidence of either acute or chronic subluxation in his spine. (Tr. 135; EX-3, p. 47). Specifically, he did not find any evidence of subluxation in the August 25, 1999 x-rays.²⁸ Dr. Van Deventer indicated that the x-rays did not show "any abnormal translation" in the alignment of the bones in Claimant's lumbar spine. (EX-3, pp. 37-38). He found evidence of subluxation in Claimant's knee. (Tr. 136).

²⁸ Dr. Van Deventer reviewed the films of the 1999 x-rays, but did not review a radiologist's report. (EX-3, p. 60).

Dr. Van Deventer defined "subluxation" as "an incomplete dislocation." He further defined "subluxation" as "an inappropriate alignment of the two joint surfaces." (Tr. 133). With regard to the spine, subluxation refers to the "relationship of one vertebral body relative to the other vertebral body" and occurs when the vertebrae "don't all line up." (Tr. 134). Dr. Van Deventer opined a CAT scan combined with a myelogram is the most precise diagnostic tool for detecting a subluxation. (Tr. 135-136). In his opinion, the Surface EMG testing used by Dr. Karno is "very inconsistent" and would be unreliable for detecting radiculopathy or nerve irritation caused by subluxation. (Tr. 140). He further testified that thermographic testing is no longer used for orthopedic purposes because of "its lack of consistent repeatable diagnostic information." (Tr. 141).

Dr. Van Deventer agreed that Dr. Karno's definition of a subluxation was consistent with his definition of a subluxation. (Tr. 138). He explained that "compression of a nerve" normally causes radiculopathy, which results in symptoms of pain radiating down the leg. (Tr. 138-139). He also testified that an individual can have a degree of subluxation and be asymptomatic or can experience radiculopathy with no subluxation. Thus, when looking at a subluxation he considers the measurement of the shift of one vertebra relative to another vertebra. (Tr. 142-143).

Dr. Van Deventer opined that the cause of Claimant's current complaints of low back pain was "multi-factorial," and believed Claimant's knee condition was a major contributing factor to his low back pain. (Tr. 157; EX-3, p. 13). Dr. Van Deventer also indicated that a 1999 x-ray showed evidence of some degeneration of a disc, which could be a source of low back pain. He could not attribute Claimant's low back pain to a specific event, but believed it was "primarily muscular in nature." (Tr. 157). His review of diagnostic tests did not reveal any significant abnormalities of Claimant's lumbar spine and his examination of Claimant's back did not reveal anything of a "structural nature" to which ongoing back pain could be attributed. (EX-3, p. 18).

Dr. Van Deventer opined Claimant no longer needed any type of orthopedic or chiropractic care as a result of his February 18, 1986 injury. (Tr. 160; EX-4, p. 5). Dr. Van Deventer testified that chiropractic treatment can be beneficial during an eight to twelve week period following a back injury in "an acute setting," but orthopedic literature has not statistically

established the benefits of long-term chiropractic care outside of the twelve-week window. (Tr. 160).

Dr. Van Deventer stated there are three causes of subluxation: (1) the degenerative process, (2) a congenial condition, and (3) a traumatic condition. He did not find evidence that any of the three foregoing events caused Claimant's lower back pain. (EX-3, pp. 43-44). Rather, Claimant's "abnormal gait," lack of flexibility, and lack of muscular conditioning could lead to low back pain. (EX-3, p. 47).

According to Dr. Van Deventer, an individual would "have to have a fairly considerable difference between the two vertebrae" to detect a subluxation by palpation. Dr. Van Deventer estimated that "one vertebrae would have to be translated about fifty percent on the other" to detect the subluxation by palpation. He found no evidence of such subluxation on the diagnostic records. (Tr. 158).

In a report dated March 20, 2005, Dr. Van Deventer again noted that "evidence of obvious abnormal spinal translation" from an orthopedic perspective was not present in any of Claimant's objective studies, i.e. x-ray examinations, CAT scan evaluations, a bone scan evaluation, and an EMG.²⁹ He further indicated that Claimant reached maximum medical improvement with regard to the February 1986 injury, although he did not provide a specific date of maximum medical improvement. Dr. Van Deventer identified Claimant's most significant orthopedic problem as "advanced degenerative osteoarthritis of his left knee." He opined Claimant's abnormal gait pattern was a major contributing factor to continued back pain. (EX-4, p. 8). Dr. Van Deventer concluded that Claimant's ongoing back symptomatology was unrelated to the 1986 injury. (EX-4, p. 9).

Dr. Frederick L. Keppel³⁰

Dr. Keppel examined Claimant on February 25, 2005. Claimant presented with complaints of left knee pain after an injury and surgery to his left knee. On physical examination, Dr. Keppel noted a varus deformity of Claimant's left knee, as well as "a positive Lachman" and "positive patellofemoral pain

²⁹ In addition to re-reviewing Claimant's medical records, Dr. Van Deventer reviewed Dr. Karno's deposition dated December 16, 2004 and medical records from the Karno Chiropractic Clinic in rendering the March 20, 2005 report. (EX-4).

³⁰ Dr. Keppel's credentials are absent from the record.

on compression." Dr. Keppel found "severe medial compartmental arthritis" on an x-ray of Claimant's left knee. (EX-22, p. 1). He opined Claimant had "ligamentous instability to his left knee," "medial compartmental arthritis," and "moderate to severe degenerative changes in his patellofemoral joint with a partial tear of the lateral meniscus." Dr. Keppel recommended a total knee arthroplasty. (EX-22, p. 2).

In a letter dated June 7, 2005, Dr. Keppel opined Claimant's degenerative changes in his left knee resulted from chronic arthritic changes that were aggravated by Claimant's February 2004 knee injury. (EX-22, p. 3).

The Contentions of the Parties

Claimant contends he is entitled to continued chiropractic treatment, arguing the February 1986 work-related accident resulted in a subluxation. Claimant does not seek compensation benefits in the instant claim. Claimant further contends all of the treatments provided by Dr. Karno are integral to the treatment of his spinal subluxation. Claimant contends Employer is liable for payment of Claimant's past and future chiropractic treatment.

Employer paid for Claimant's chiropractic treatment until April 2002 and contends it is not liable for the costs of Claimant's chiropractic treatment from April 16, 2002 to present, arguing that Claimant does not suffer from a subluxation. Employer further contends it is not liable for any additional medical treatment, evaluations, or consultations, as Claimant's February 1986 low back injury reached maximum medical improvement on July 11, 1987 and has completely resolved. Employer argues Claimant engaged in fraud under Section 31(a) of the Act by intentionally withholding crucial information regarding his medical history and making misleading statements in an effort to recover compensation benefits in both state and federal courts. Finally, Employer contends Claimant's request

for continued chiropractic benefits should be denied through the imposition of the adverse inference rule.³¹

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Claimant's Credibility

Employer contends Claimant's testimony, medical records, and interrogatory responses contain discrepancies or material

³¹ At formal hearing and in the Joint Stipulations, Employer raised the issue of whether it is entitled to reimbursement from either Claimant or Dr. Karno for the amounts previously paid for Claimant's chiropractic treatment. In its post-hearing brief, without reference to any precedential authority, Employer argues that costs associated with chiropractic care for other than spinal manipulation should be subject to reimbursement from future benefits, if Claimant is successful in the instant claim. In view of the ultimate conclusion in this matter, Employer's contention is moot. However, I find no authority under the Act for granting Employer's requested reimbursement. I also find the case relied upon by Employer, Hunt v. Director, OWCP, 999 F.2d 419, 27 BRBS 84 (CRT) (9th Cir. 1993), is not analogous to the present matter and does not provide support for Employer's requested reimbursement. Accordingly, the request is **DENIED**.

misstatements regarding a period of incarceration and his medical history.

An administrative law judge has the discretion to determine the credibility of witnesses. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); see also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972).

It is well established that when a party has relevant evidence within its control which it fails to produce, that failure gives rise to an inference that the evidence is unfavorable to it. See Denton v. Northrop Corp., 21 BRBS 37 (1988); Cioffi v. Bethlehem Steel Corp., 15 BRBS 201 (1982). See also 29 C.F.R. § 18.6(d)(2).

On December 8, 2005, the undersigned issued an Order invoking a negative or adverse inference to be applied to any evidentiary ruling concerning information requested in Employer's Interrogatories Nos. 3, 4, 5, 6, 7, 10, and 30, as well as in Employer's Request for Production Nos. 3 through 9.

After reviewing the foregoing Interrogatories and Requests for Production, I find the adverse inference would apply only to information regarding Claimant's conviction on one count of money laundering. I further find this adverse inference would bear only on Claimant's credibility. However, testimony regarding Claimant's conviction and incarceration was elicited at formal hearing.

In response to an interrogatory propounded in an unrelated Louisiana Workers' Compensation claim, Claimant admitted to a period of incarceration for one count of money laundering. According to the interrogatory response, Claimant was incarcerated for seventeen months from February 10, 1998 until September 1999. In response to a similar interrogatory propounded by Employer in the present matter, Claimant's answer simply referred to his deposition testimony of December 16, 2004. Review of the deposition transcript reveals no discussion of Claimant's incarceration. Accordingly, I find that Claimant's credibility is diminished in view of his conviction for money laundering and by his failure to disclose information regarding his incarceration in response to Employer's interrogatory request.

I further find Claimant's credibility is diminished by his failure to disclose left knee problems in existence prior to February 2004 during his November 2005 deposition and to Dr. Butler. During the deposition and at formal hearing, Claimant admitted to experiencing left leg pain, which he attributed to his sciatica. At his initial visit with Dr. Butler, he reported no prior history of knee symptoms. However, prior medical records from Dr. Krieger and Ochsner Clinic respectively diagnosed left knee osteoarthritis in 1987 and advanced degenerative arthrosis of his left knee in 2003. Accordingly, I find the omission of such information in response to direct questions regarding prior left knee conditions weighs against Claimant's credibility.

Employer also points out that Dr. Karno's medical records contained an x-ray report and treatment notes dated between August 25, 1999 and August 31, 1999. Because Claimant's hearing testimony indicated that he was incarcerated until August 1999, Employer contends Claimant's veracity is called into doubt.

I do not find that Claimant's veracity is affected by the existence of x-rays and medical records dated August 25, 1999 to August 31, 1999, as the formal hearing record does not precisely identify the date on which Claimant was released from incarceration. Claimant's interrogatory response indicated he served until September 1999, while his hearing testimony indicated he served until August or September 1999. However, during formal hearing and within his interrogatory responses for his state workers' compensation claim, Claimant maintained that he served a seventeen month period of incarceration and he testified that his incarceration period may have ended prior to September 1999. As such, it is entirely possible and plausible that Claimant's period of incarceration ended prior to August 25, 1999. Accordingly, I decline to further diminish Claimant's credibility on this basis.

Employer also notes that Claimant failed to report knee pain to Dr. Karno on February 12, 2004, following his left knee injury while working for Wal-Mart. Employer points out that Claimant presented to Dr. Karno with complaints of lower and mid-back pain on March 11, 2004 and March 15, 2004, but did not report such pain to Dr. Butler on March 12, 2004. While I agree the foregoing records show inconsistencies in Claimant's complaints to his medical providers, Claimant testified that his former counsel advised him to keep his back and knee treatments separate. Review of Dr. Karno's treatment notes shows that Claimant reported left leg pain on February 18, 2004, and on

three occasions between March 1, 2004 and March 9, 2004. Because Claimant presented with complaints of left leg pain shortly after the February 12, 2004 knee injury, I find that his failure to report such pain on February 12, 2004, does not bear heavily against his credibility. Moreover, Dr. Karno's records indicate that Claimant presented for knee treatment on March 12, 2004. Thus, I am not persuaded that Claimant's credibility should be discounted based on the absence of back complaints.

Based on Claimant's failure to disclose his seventeen month incarceration in his interrogatory responses generated in conjunction with the present matter and based on his failure to disclose his prior left knee condition during his deposition and course of treatment with Dr. Butler, I find Claimant's veracity is questionable. Accordingly, I accord little weight to Claimant's testimony in the absence of corroborating record evidence.

B. Entitlement to Medical Care and Benefits

1. Chiropractic Care

Claimant contends he is entitled to full reimbursement for chiropractic care since Dr. Karno diagnosed a lumbar subluxation based on his interpretation of x-rays. Employer contends that Claimant's chiropractic treatment is not compensable under the Act and that Claimant is not in need of any additional medical treatment, evaluation, or consultation. Because it is not clear whether Employer contests Claimant's entitlement to future medical care of any nature or strictly contests Claimant's entitlement to chiropractic care, the undersigned will consider his general entitlement to medical treatment.

Section 7(a) of the Act provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v.

Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

The term "physician" includes doctors of medicine (MD), surgeons, oidiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings. Physicians may interpret their own x-rays. See 20 C.F.R. §702.404.

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

I find that Drs. Karno, Van Deventer, and Butler provided similar definitions of "subluxation." Nonetheless, review of Claimant's medical records reveals that only Drs. Karno and Van

Deventer directly addressed the presence or absence of spinal subluxation.

Dr. Karno's and Dr. Van Deventer's findings based on Claimant's August 1999 x-ray are in direct contradiction with one another.³² Dr. Karno identified lumbar subluxation on the August 1999 x-ray, while Dr. Van Deventer found no evidence of spinal subluxation in the same x-ray. In light of Dr. Van Deventer's credentials, I accord greater weight to his interpretation of the x-ray. Accordingly, I find and conclude the x-ray does not support a finding of subluxation.

Moreover, Dr. Krieger ordered and reviewed a bone scan, nerve conduction studies, and a CT scan and found that each diagnostic test returned normal results. Dr. Van Deventer also reviewed reports of Claimant's CAT scan, bone scan, and EMG. He indicated that none of the diagnostic studies showed evidence of spinal subluxation. It is not clear whether Dr. Karno reviewed these additional reports. Consequently, I find Dr. Van Deventer's opinion that Claimant does not suffer from spinal subluxation is more reasoned and supported by the record.

Dr. Karno also relied on surface EMGs, thermography, and palpation in detecting and diagnosing Claimant's lumbar subluxation. However, Dr. Van Deventer indicated that surface EMGs produce inconsistent results and that thermography is no longer used for orthopedic purposes due to its inconsistent diagnostic information. He additionally stated that a "fairly considerable difference between two vertebrae" must be present to identify a subluxation through palpation. Dr. Van Deventer's opinions are supported by the testimony of Dr. Butler. Although Dr. Butler did not review Claimant's diagnostic tests or address the presence of spinal subluxation, he indicated that spinal subluxation can be identified only through x-rays and cannot be detected by palpation. He further indicated that thermography is not accepted as a reliable diagnostic tool in the treatment of spinal disorders. Given the testimony of Drs. Van Deventer and Butler, I find and conclude Dr. Karno supported his diagnosis of lumbar subluxation with unreliable and generally unaccepted methods of testing.

³² Employer challenged the validity of the August 25, 1999 x-ray, as well as Dr. Karno's treatment of Claimant from August 25, 1999 to August 31, 1999, contending Claimant was incarcerated at that time. For reasons previously discussed, I find Claimant could have been treated by Dr. Karno at the end of August 1999. Accordingly, I find no reason to discount the validity of Dr. Karno's August 1999 reports.

The proponent of a rule or position has the burden of proof, by preponderance of the evidence, in cases resolved under the Administrative Procedures Act. See Greenwich Collieries, supra; Santoro v. Maher Terminals, Inc., 30 BRBS 171 (1996). In the present matter, I find Claimant has not met his burden of proof as the record does not support a finding that he suffers from a subluxation. At best, I find the record evidence to be evenly balanced. Accordingly, I would further find and conclude Claimant has failed to meet his required burden of proof.

Based on the foregoing, I find and conclude Employer is not liable for Claimant's continued chiropractic treatment, as Claimant has not set forth reasoned x-ray or clinical findings of subluxation based on the instant record.³³

2. Additional Medical Treatment, Evaluation, or Consultation

In arguing Claimant is not entitled to additional medical treatment, evaluation, or consultation, Employer contends Claimant reached maximum medical improvement (MMI) on July 11, 1987.

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

Drs. Moss, Rabito, and Krieger each diagnosed a lumbar or low back strain in 1986. While Dr. Krieger's records do not specifically assign an MMI date, he released Claimant to full duty work on July 11, 1987. In October 1987, Claimant had not yet been released from treatment. Dr. Van Deventer similarly opined Claimant's 1986 work-related accident resulted in a lumbar strain/sprain based on his review of Claimant's medical records and medical history. He would have expected Claimant to reach maximum medical improvement nine to twelve months after the accident.

³³ I find the cases cited by Claimant are inapposite to the present matter. In the cases cited by Claimant, the administrative law judges (ALJ) found the claimants suffered from subluxations and based their findings on either uncontroverted or corroborated medical opinions. Further, the ALJs found the employers liable for chiropractic services other than spinal manipulation which were found necessary and interconnected with the reimbursable manipulation treatments.

Dr. Karno did not provide a date of maximum medical improvement for Claimant's 1986 injury. Rather, he indicated Claimant's condition reaches periods of stabilization and subsequently destabilizes over time due to factors such as changes in stress, posture, or gait, and occurrences such as sneezing.

A temporary deterioration of a permanently disabled worker does not render him temporarily disabled. Leech v. Service Engineering Co., 15 BRBS 18 (1982).

The weight of the medical evidence favors a diagnosis of a lumbar strain and Dr. Van Deventer offered the only credentialed opinion regarding an expected date of MMI. However, Claimant was still actively seeking treatment from Dr. Krieger and had not been released to return to work one year after he sustained the 1986 injury. Accordingly, I find and conclude Claimant reached maximum medical improvement on July 11, 1987, as that date is more than one year post-injury and is the date that Claimant was released to full-duty work.

The finding of MMI, however, does not alter Claimant's entitlement to reasonable and necessary medical benefits arising as a result of his work-related injury. Accordingly, I find and conclude Claimant remains entitled to any future reasonable and necessary medical benefits that arise as the natural and unavoidable result of the 1986 work injury.

C. Section 31 Fraud

Section 31(a) states that any false statement or representation, which is knowingly and willfully made for the purpose of obtaining benefits under the Act, is a felony, punishable by a fine of not more than \$10,000 or imprisonment not to exceed five years or both. See 33 U.S.C.A. § 931(a)(1). The United States attorney for the district in which the injury is alleged to have occurred is to make every reasonable effort to promptly investigate any complaint made under this subsection. See 33 U.S.C.A. § 931(a)(2).

Employer alleged that Claimant engaged in fraud under Section 31(a) of the Act.³⁴ Employer contends the August 1999 x-ray and treatment with Dr. Karno occurred while Claimant was incarcerated and contends Claimant intentionally withheld crucial medical history or made misleading statements regarding

³⁴ Employer's brief cites Section 20 of the Act.

his medical history to recover workers' compensation benefits in both federal and state courts. Again, I find Employer has not established that Claimant was incarcerated from August 25, 1999 to August 31, 1999.

Based on the foregoing and without more specific allegations regarding the alleged intentional withholding of medical history and misleading statements, I find and conclude Employer has not shown that Claimant engaged in fraud under the Act and its request that the matter be referred to the Attorney General for prosecution is **DENIED**.

V. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.³⁵ A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer is not responsible for Claimant's continued chiropractic care or treatment based on the instant record.

2. Employer shall remain responsible for all reasonable, appropriate and necessary medical expenses arising from Claimant's February 18, 1986, work injury, pursuant to the provisions of Section 7 of the Act.

³⁵ Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **June 1, 2004**, the date this matter was referred from the District Director.

3. Employer's request that this matter be referred to the Attorney General for prosecution of fraud under Section 31(a) of the Act is **DENIED**.

4. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 6th day of April, 2006, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge